FOR ARGUMENT

Supreme Court, U.S.
FILED
DEC 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1888

EDWARD W. MAHER, Commissioner of the Department of Income Maintenance, State of Connecticut,

Petitioner,

v.

VIRGINIA GAGNE, Individually and on Behalf of Others Similarly Situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS

DAVID C. SHAW
JOAN EISENMAN PILVER
CATHERINE M. CALLERY
ROSALIND RIBVAT SILVERSTEIN
THE LEGAL AID SOCIETY OF HARTFORD COUNTY, INC.
525 Main Street
Hartford, Conn. 06103
(203) 566-6360

MICHAEL B. TRISTER
SOBOL & TRISTER
Suite 501
910 Seventeenth St., N.W.
Washington, D.C. 20006
(202) 223-5022

HOWARD L. ZWICKEL
CENTER ON SOCIAL WELFAR POLICY AND LAW
95 Madison Avenue
New York, N.Y. 10016
(212) 679-3709

Counsel for Respondents

Washington, D.C. • THIEL PRESS • (202) 638-4521

INDEX

OPINION BELOW 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT:

1. History of the Litigation 3
2. The Attorneys' Fees Award 6

SUMMARY OF ARGUMENT 8

ARGUMENT:

1. The Courts Below Correctly Held That in This Case, The Fees Awards Act Authorizes Fees to Be Awarded 12
   - A. Plaintiff's Action Was Brought to Enforce a Provision of 42 U.S.C. §1983 Within the Meaning of the Fees Awards Act 13
   - B. Plaintiff Was a Prevailing Party Within the Meaning of the Fees Awards Act Because She Obtained Significant Relief Through the Consent Decree and the Claims Alleged in the Complaint Were Substantial 20
2. The Courts Below Correctly Held That an Award of Fees Was Not Barred by the Eleventh Amendment 26

CONCLUSION 35

TABLE OF AUTHORITIES

Cases Cited:

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 16

Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975) 24

Cases Cited (continued)

Batterton v. Francis, 432 U.S. 416 (1977) 15

Bond v. Stanton, 504 F.2d 1246 (7th Cir. 1974), *cert. denied*, 420 U.S. 984, *on attorneys' fees*, 528 F.2d 688 (7th Cir. 1976), *vacated and remanded*, 429 U.S. 973 (1976), *on remand*, 555 F.2d 172 (7th Cir. 1977) *cert. denied*, 438 U.S. 916 (1978) 19

Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979 . . . . . 22, 26

Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) 29

Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978) 23

Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977) 22

Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.) *cert. denied*, 409 U.S. 982 (1972) 24

Burns v. Alcala, 420 U.S. 575 (1975) 15

Campagnuolo v. White, Civil No. 13968 (D. Conn., June 1972), (unpublished) 25

Cannon v. University of Chicago, ___ U.S. ___, 99 S.Ct 1946 (1979) 15

Carleson v. Remillard, 406 U.S. 598 (1972) 15

Carter v. Stanton, 405 U.S. 669 (1972) 15

Chapman v. Houston Welfare Rights Organization, ___ U.S. ___, 99 S.Ct. 1905 (1979) 14, 15, 31

Class v. Norton, 505 F.2d 123 (2d Cir. 1974) 29

Cort v. Ash, 422 U.S. 66 (1975) 15

County Court of Ulster County v. Allen, ___ U.S. ___, 99 S.Ct. 2213 (1979) 20

Crowe v. Cherokee Wonderland, Inc., 379 F.2d 51 (4th Cir. 1967) 21

Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977) 22

Cases Cited (continued)

Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979) 22

Edelman v. Jordan, 415 U.S. 651 (1974) 10, 15, 29, 31

Employees of the Dep't of Pub. Health and Welfare v. Dep't of Pub. Health and Welfare, 411 U.S. 279 (1973) 28

Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974) 22

Evers v. Dwyer, 358 U.S. 202 (1958) 24

Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) 16

Fairmont Creamery v. Minnesota, 275 U.S. 70 (1927) 28, 30

Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978) 22

Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir. 1975), *aff'd in part, rev'd in part*, 427 U.S. 445 (1976) . . . . . passim

Foster v. Boorstin, 561 F.2d 340 (D.C. Cir. 1977) 22

Fry v. United States, 421 U.S. 542 (1975) 34

Hagans v. Lavine, 415 U.S. 528 (1974) 7, 15, 17, 26

Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978) 23

Hutto v. Finney, 437 U.S. 678 (1978) . . . . . passim

Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974) 24

Iranian Students Ass'n v. Edwards, 604 F.2d 352 (5th Cir. 1979) 22

Jones v. Diamond, 594 F. 2d 997 (5th Cir. 1979) 23

Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974) 29

Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) 29

Katzenbach v. Morgan, 384 U.S. 641 (1966) 11, 31, 32, 33,34

King v. Smith, 392 U.S. 309 (1968) 14

Cases Cited (continued)

LaRaza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) 16

Lascaris v. Shirley, 420 U.S. 730 (1975) 15

Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971) 24

Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971) 16

Lewis v. Martin, 397 U.S. 552 (1970) 15

Miller v. Youakim, 440 U.S. 125 (1979) 14

Morales v. Haines, 486 F.2d 880 (7th Cir. 1973) 17

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 22, 23, 26

National Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704 (D.C. Cir. 1977) 22

National League of Cities v. Usery, 426 U.S. 833 (1976) 34

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 20

New York Dep't of Social Services v. Dublino, 413 U.S. 405 (1973) 15

Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970) 22, 24

Parker V. Matthews, 411 F. Supp. 1059 (D.D.C. 1976), *aff'd sub. nom., Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977) 22, 24

Peltier v. City of Fargo, 533 F.2d 374 (8th Cir. 1976) 22

Philbrook v. Glodgett, 421 U.S. 707 (1975) 15

Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) 23

Public Service Comm's v. Brashear, 312 U.S. 621 (1941) 25

Cases Cited (continued)

Quern v. Jordan, 440 U.S. 332 (1979) 29, 31

Quern v. Mandley, 436 U.S. 725 (1978) 14

Regalado v. Johnson, 79 F.R.D. 447 (E.D. Ill. 1978) 23

Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979) 22, 26

Rosado v. Wyman, 397 U.S. 397 (1970) 15

Sethy v. Alameda County Water Dist., 602 F. 894 (9th Cir. 1979) 23

Shea v. Vialpando, 416 U.S. 251 (1974) 4, 13, 15

Skehan v. Board of Trustees, 501 F.2d 31 (3r Cir. 1974), *vacated* and *remanded* , 538 F.2d 53 (1976) *(en banc), cert. denied*, 429 U.S. 979 (1976) . . . 29

Southeast Legal Defense Group v. Adams, 436 F. Supp. 891 (D. Ore. 1977) 20

Souza v. Travisono, 512 F.2d 1137 (1st Cir.) *vacated* and *remanded*, 423 U.S. 809 (1975) 29

Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1944) 20

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 30

Townsend v. Swank, 404 U.S. 282 (1971) 15

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 17

United States v. Friedland, 391 F.2d 378 (2d Cir. 1968) 441 F.2d 855 (2d Cir.), *cert. denied*, 404 U.S. 867 (1971) 21

Van Lare v. Hurley, 421 U.S. 338 (1975) 15

United States Constitution:

Eleventh Amendment . . . . . passim

Fourteenth Amendment . . . . . passim

Federal Statutes:

28 U.S. C. §1343 4

28 U.S.C. §2284 25

42 U.S.C. §1983 ..... passim

42 U.S.C. §1988 ..... passim

Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000e 31

Social Security Act of 1935, §402 (a)(7); 42 U.S.C. §602 (a)(7) 4, 5, 13, 14

Rev. Stat. §1979, 42 U.S.C. §1983 ..... passim

The Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, 42 U.S.C. §1988 ..... passim

State Regulations:

Connecticut Dep't of Social Services Manual, Vol. I, Ch. III, Index 332.31 ..... 3, 5

Congressional Materials:

Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House of Representatives Committee on the Judiciary, 94th Cong., 1st Sess. (1975) 33

Hearings on Legal Fees Before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. (1973) 32

S. Rep. No. 94-1011, 94th Cong. 2d Sess., *reprinted in* [1976] *U.S. Code Cong. & Ad. News* 5908 ..... passim

H. Rep. No. 94-1558, 94th Cong. 2d Sess., (1976) ..... passim

122 Cong. Rec. 31472 (1976) 16

122 Cong. Rec. 33313 (1976) 19

122 Cong. Rec. 33314 (1976) 19

122 Cong. Rec. 33315 (1976) 19

Congressional Materials (continued)

122 Cong. Rec. 35115 (1976) 18

122 Cong. Rec. 35117 (1976) 16

122 Cong. Rec. 35122 (1976) 18

122 Cong. Rec. 35123 (1976) 19

122 Cong. Rec. 35125 (1976) 18

122 Cong. Rec. 35126 (1976) 16, 18

122 Cong. Rec. 35127 (1976) 19

122 Cong. Rec. 35128 (1976) 19

Other Materials:

Note, Attorneys' Fees and the Eleventh Amendment, 88 Harv. L. Rev. 1875 (1975) 29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1888

EDWARD W. MAHER, Commissioner of
the Department of Income Maintenance,
State of Connecticut,
Petitioner,

v.

VIRGINIA GAGNE, Individually and on
Behalf of Others Similarly Situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS

OPINIONS BELOW

The decision of the Court of Appeals (Pet. A. 1a-18a) has now been reported at 594 F.2d 336 (1979). The opinion of the district court (A. 83-91) is reported at 455 F. Supp. 1344 (D. Conn. 1978).

QUESTIONS PRESENTED

1. Whether the Civil Rights Attorney's Fees Awards Act authorizes an award of attorneys' fees in a case raising federal constitutional and statutory claims under 42 U.S.C. section 1983, when the case is settled by consent decree prior to adjudication of the case on the merits.

2. Whether the awarding of attorneys' fees under the Civil Rights Attorney's Fees Awards Act against a state official acting in his official capacity is barred by the Eleventh Amendment.

CONSTITUTIONAL PROVISIONS

Eleventh Amendment, United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT

1. History of the Litigation.

As an incentive to encourage public assistance recipients to work, work-related expenses are deducted from an AFDC applicant's income in the process of determining eligibility for assistance and in determining the amount of assistance available to an eligible recipient. Under policies in effect when this case was filed in January, 1975, the Connecticut Department of Social Services (later called Department of Income Maintenance), limited the types and amount of work-related expenses which it would deduct from recipient's income. Specifically, Connecticut Department of Social Services Manual, Vol. I, Ch. III, Index 332.31, reprinted at A. 65-66, provided that only certain expenses enumerated in the Manual could be deducted and that the amounts allowed for lunches and automobile transportation were limited to 50 cents per working day and 6 cents per mile, respectively. Recipients whose actual expenses exceeded these amounts or who incurred work-related expenses not enumerated in the Manual were not permitted deductions for these amounts;[1] nor were recipients informed of which expenses, if any, were allowed by the Department. (A. 70-73).

---

[1] In his Answer to the Complaint, the Commissioner of Social Services denied that the lunch and transportation allowances were maximums. (A. 17-19). However, during discovery, conducted in April, 1975, the Chief of Policy and Staff Services of the Department acknowledged that the allowances were intended as maximums:

> Q. I'm not really quite clear as to the Department's position that any amount requested in excess of the $.06 cents a mile and the $.50 cents a day is per se unreasonable? Is that your position?

[footnote continued]

Plaintiff, Virginia Gagne, filed this action in the United States District Court for the District of Connecticut on behalf of herself and all other AFDC recipients who had been injured by the Department's work-expense policies. She requested injunctive relief and a declaratory judgment that the Connecticut work-expense policies violated section 402 (a)(7) of the Social Security Act[2] and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (A. 4-13). Her Complaint alleged that the plaintiff's actual transportation expenses were 13.9 cents per mile, as compared to the 6 cents per mile allowed by the State, and that her meal expenses were $1.65 per day, more than three times the amount allowed. (A. 8). The complaint alleged that plaintiff's claims were authorized by 42 U.S.C. §1983 and that the district court had jurisdiction under 28 U.S.C. §1343. (A. 5).

A. Yes

. . .

Q. So then, I guess my last question would be, do you ever allow more than $.50 cents a day for lunches or more than $.06 cents a mile?

A. No, not to my knowledge.

(Deposition of Caroline Packard [R.21] at 43).

[2]Section 402(a) (7) of the Social Security Act requires that in administering the Aid to Families with Dependent Children program (AFDC) states must "take into consideration . . . any expenses reasonably attributable to the earning of . . . income." 42 U.S.C. §602(a) (7). In *Shea v. Vialpando*, 416 U.S. 251 (1974), this Court held that under section 402(a) (7), states may not adopt a standardized allowance for expenses attributable to the earning of income which does not allow an individual to deduct expenses that exceed the standard.

On May 29, 1975, five months after the Complaint was filed, the Department of Social Services amended its policies pertaining to work-related expenses. Under the revision, when expenses other than those listed in the Manual were claimed by recipients, they were to be referred by local welfare workers to the Office of State Deputy Commissioner for consideration. (A. 68-69). The practice of not notifying recipients of allowed expenses was not corrected. Moreover, in his written response to interrogatories filed shortly after the policy was revised, defendant continued to state that he did not allow work expenses other than those expressly listed in the Manual. (A. 34-35). And, in further responses, filed more than a year after the revised policy was adopted, defendant provided data which showed that virtually no recipients had received work expense deductions greater than those provided under the policy challenged in the original complaint. (A. 52-53). The responses further showed that the Department continued to place limits on the types of work expenses for which deductions would be allowed. (A. 48).

On September 10, 1976, plaintiff filed an Amended Complaint in which she alleged that the Department had revised its policies on May 31, 1975, but that as a matter of practice, expenses in excess of the State's maximums and for items not listed in the Manual continued to be denied. (A. 59-60). In addition to her original claims under section 402 (a)(7) of the Social Security Act and the Fourteenth Amendment, which were realleged, plaintiff alleged in the Amended Complaint that the Department's failure to provide notice to recipients of their right to claim work expense deductions in excess of the maximums in the policy Manual, and to inform recipients of which expenses, if any, were disallowed,

violated their right to procedural due process under the Fourteenth Amendment. (A. 59-63). Thereafter, plaintiff filed further discovery, a Motion for Certification of the Class, and an Application for the Convening of a Three-Judge District Court. (R. 35, 37, 38).

Shortly after plaintiff filed her Amended Complaint and related motions, settlement negotiations were instituted between the parties which led to the submission of a Consent Decree to the district court. The Consent Decree provided substantial relief to the plaintiff and her class. The Department agreed, subject now to the remedy of contempt, that limits would no longer be imposed on the work-related expenses available to recipients. (A. 76-77). It also agreed to increase its standards for determining usual costs for transportation from 6 cents to 12 cents a mile and to review all of its standards annually. (A. 77-78). Finally, defendant agreed to institute detailed procedures designed to inform recipients of their right to claim deductions in excess of the Department's standards and to enable them to challenge administratively any decisions denying deductions that were claimed. (A. 78-79). The Consent Decree was approved and entered by the district court on March 2, 1977.

2. The Attorneys' Fees Award

During settlement negotiations, the parties agreed that the issue of plaintiff's entitlement to attorneys' fees would be submitted to the district court for resolution following approval of the Consent Decree. (Tr. of hearing dated May 16, 1977, at 9-10). On April 4, 1977, plaintiff submitted a Motion for Attorneys' Fees which was supported by affidavits documenting the amount of time spent in litigating the case and the prevailing charges in the community. Following a hearing,

the district court awarded fees to the plaintiff under 42 U.S.C. §1988 in the amount of $3,012.19.

In his opinion, Chief Judge T. Emmet Clarie found that plaintiff was the "prevailing party" because she had obtained, through the Consent Decree, "virtually all the relief sought in the Complaint." *Gagne v. Maher,* 455 F. Supp. 1344, 1346 (D. Conn. 1978). The court also rejected defendant's argument that plaintiff should not recover attorneys' fees because the defects in the state policies were inconsistent with a federal statute, rather than with the Constitution. With respect to this contention, Judge Clarie held that if the issue had been presented on a motion to dismiss, he would have ruled as a matter of law that there was federal jurisdiction over both the statutory and constitutional claims under the doctrine of *Hagans v. Lavine,* 415 U.S. 528 (1974), since plaintiff's complaints raised "several constitutional issues which are 'substantial'." 455 F. Supp. at 1348. Finally, the court found that hourly rate of $45 an hour to be fair and reasonable.[3]

The Court of Appeals for the Second Circuit, in an opinion by Judge Wilfred Feinberg, unanimously affirmed the award of attorneys' fees to plaintiff. It agreed with the district court that under 42 U.S.C. §1988 fees may be awarded to parties who obtain substantial relief without the necessity of a trial; and it held that on the facts

---

[3]The district court disallowed counsels' time spent in seeking attorneys' fees, as well as one-half of the remaining time spent by plaintiff's counsel. It also reduced the fee by an additional one-third because plaintiff's attorneys were employed by a legal aid program which received some of its support under a program administered by the defendant. 455 F. Supp. at 1349-50. The court of appeals remanded the first of these issues for reconsideration, and affirmed as to the others. 594 F.2d at 343-45. These issues are not before the Court.

of this case, plaintiff's lawsuit had been the basis for the change in the defendant's practices. 549 F.2d 336, 339-41 (2d Cir. 1979). It also held that fees could be awarded under section 1988 because plaintiff's constitutional claims were substantial and arose out of the same operative facts as the plaintiff's claims under the Social Security Act. 594 F.2d at 341. Finally, the court held that the award of attorneys' fees was not barred by the Eleventh Amendment because that provision is not applicable to attorneys' fees, which have only an "ancillary effect" on the state treasury and because, in any event, Congress has power under section 5 of the Fourteenth Amendment to set aside the state's immunity so long as the constitutional claims raised in the Complaint are substantial.

SUMMARY OF ARGUMENT

I

The Civil Rights Attorney's Fees Awards Act of 1976 requires that two conditions be met before fee awards can be made. First, the action must be brought to enforce a provision of one of the enumerated statutes including 42 U.S.C. §1983, and second, the party seeking the fee must be the "prevailing party." The courts below properly held in this case that both of these conditions had been met.

Plaintiff's Complaint and Amended Complaint alleged that the defendant's work expense policies violated her rights to due process and equal protection of the laws. She additionally alleged that the defendant's policies violated the Social Security Act. Defendant claims that because the plaintiff coupled her constitutional claims with a statutory claim, her case is removed from the coverage of the Fees Awards Act. This argument

must be rejected, because it is clear that the language of the statute authorizes the awarding of fees in *any* case brought under any of the enumerated statutes, focusing as it does on the nature of the action brought, rather than on the basis for the relief awarded. Plaintiff maintains that both her constitutional and statutory claims were properly brought under 42 U.S.C. §1983, but that in any case, plaintiff's constitutional claims, standing alone, found by the courts below to be "substantial," are sufficient in themselves to support a fee award.

The legislative history of the Fees Awards Act strongly supports the joining of federal statutory claims with constitutional claims, since Congress in enacting the Fees Awards Act was well aware that many cases brought under the enumerated statutes involved such joinder of claims, and intended to continue the judicially established practice of awarding fees in such situations.

Permitting the inclusion of constitutional and statutory claims furthers the principle purpose of the Fees Awards Act to encourage the filing of meritorious litigation to enforce the Fourteenth Amendment while at the same time furthering the judicial policy of avoiding unnecessary constitutional adjudication.

Plaintiff was the prevailing party within the meaning of the Fees Act in this case although it was settled by Consent Decree. Legislative history clearly supports the awarding of fees to prevailing parties in consent judgment cases, recognizing that it promotes the private enforcement of those rights embodied in the Fourteenth Amendment. To suggest otherwise, would discourage the voluntary settlement of disputes, promote unnecessary litigation, and create the potential for conflicts of interest between plaintiff and counsel seeking an award of fees solely from the defendant.

The courts below found that the Consent Decree gave the plaintiff "virtually all the relief sought in the complaint," 445 F.Supp. at 1346, and that the defendant changed its policies only under the pressure of the lawsuit. The court of appeals' finding that the plaintiff's constitutional claims were substantial was sufficient to support an award of fees even though the case was not decided on the merits. Such a ruling is clearly consistent with congressional concerns regarding the filing of nuisance litigation, and is clearly consistent with the judicial goal of avoiding unnecessary decision making of constitutional questions.

In *Hutto v. Finney,* 437 U.S. 678 (1978), this Court held that Congress, acting pursuant to section 5 of the Fourteenth Amendment, intended to set aside the states' Eleventh Amendment immunity to an award of attorneys' fees under the Fees Awards Act although such a waiver was not explicit in the language of the statute. The Court determined that attorneys' fees were to be awarded as "a part of costs," which traditionally have not been subject to the Eleventh Amendment. This Court strongly suggested further that attorneys' fees, like costs, may not be subject to the Eleventh Amendment in any case. The court of appeals below reached a similar conclusion, holding that attorneys' fees are "incident to a judgment granting prospective relief," 594 F.2d at 341, relying on the "ancillary effect" exception set forth by this Court in *Edelman v. Jordan,* 415 U.S. 651 (1974).

However, even if fee awards are subject to the Eleventh Amendment, the Court in *Hutto* also found that Congress had the power under section 5 of the Fourteenth Amendment to authorize fee awards against state officials

acting in their official capacities in cases decided on constitutional grounds. The fact that plaintiff's constitutional claims were not decided prior to entry of the Consent Decree should not change the result.

This Court's holdings in *Hutto* and earlier in *Katzenbach v. Morgan,* 384 U.S. 641 (1966), clearly established that Congress was acting well within its powers in sanctioning fee awards in cases resolved by consent decree. These cases substantiate that Congress posesses broad remedial powers under section 5 so long as it is acting rationally to enforce rights guaranteed under the Fourteenth Amendment. The legislative hearings, debates, and reports concerning the Fees Awards Act confirming that fee awards in settled cases would encourage litigation to enforce rights guaranteed by the Fourteenth Amendment, yet would have only minimal impact on state treasuries. By authorizing federal judges to make fee awards in cases settled by consent decrees when substantial constitutional claims are found, as in the instant case, Congress has insured that fees will be awarded only when litigants are enforcing Fourteenth Amendment rights and has furthered the strong judicial policy of avoiding the unnecessary determination of constitutional questions. *Hutto and Katzenback* both counsel, then, that such a rational enactment by Congress under section 5 is sufficient to displace any state Eleventh Amendment immunity which may exist.

ARGUMENT

Two terms ago in *Hutto v. Finney,* 437 U.S. 678 (1978), this Court held that the Civil Rights Attorney's Fees Awards Act of 1976, [hereinafter the Fees Awards Act][4]

[4]Pub. L. 94-559, 90 Stat. 2641, codified at 42 U.S.C. §1988.

authorizes the assessment of attorneys' fees against state officials sued in their official capacities and that the Eleventh Amendment does not deny federal courts jurisdiction to make such awards in proper cases. This case differs from *Hutto* in only two respects. First, in the earlier case the plaintiffs' claims for relief arose only under the Fourteenth Amendment, whereas here, in addition to her claims under the Fourteenth Amendment, the plaintiff alleged that the defendant had violated her rights under the Social Security Act. Second, while the plaintiffs in *Hutto* had been awarded attorneys' fees after a favorable adjudication of their constitutional claims, fees were awarded in this case following the entry of a Consent Decree, in which there was no finding of a constitutional violation.

Neither of these differences requires a result different from that in *Hutto*. Part I of this Brief establishes that plaintiff's action is covered by the express language of the Fees Award Act and that Congress expressly intended to cover actions such as this one. Part II establishes that the award of attorneys' fees under the Act, on the facts of this case, is not prohibited by the Eleventh Amendment.

1. The Courts Below Correctly Held That in This Case the Fees Awards Act Authorizes Fees to Be Awarded

Under the Fees Awards Act[5] two conditions must be met before attorneys' fees may be awarded. First, the

[5]The Act provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

action must have been brought "to enforce a provision of" one of the enumerated statutes, including section 1979 of the Revised Statutes, 42 U.S.C. §1983. Second, the party seeking the fee must have been the "prevailing party." Both of these requirements are satisfied in this case.

A. Plaintiff's Action Was Brought to Enforce a Provision of 42 U.S.C. §1983 Within the Meaning of the Fees Awards Act

Plaintiff's original and amended complaints both alleged that the defendant's work-expense policies violated her rights under the due process and equal protection clauses of the Fourteenth Amendment. Although they did not reach the merits, the district court and the court of appeals both found that these constitutional claims were substantial.[6] See 455 F. Supp. at 1348, 594 F.2d at 341.

If the constitutional claims asserted by the plaintiff were her only claims for relief, plaintiff clearly would be entitled to attorneys' fees under section 1988 if she were the prevailing party, since her action would have been brought to enforce a provision of section 1983. Defendant contends, however, that the fact that the plaintiff alleged in her complaint that the Department of Social Services' work-expense policies also violated the Social Security Act somehow removes her case from the coverage of section 1988. This argument must be rejected because it is clear that section 1988 permits fees to be

[6]Plaintiff's equal protection and substantive due process claims were virtually identical to the constitutional claims that supported federal jurisdiction in *Shea v. Vialpando*, 416 U.S. 251 (1974). The State's assertion, Brief For Petitioner at 15, that plaintiff's constitutional claims have no substance without reference to section 402(a) (7) of the Social Security Act, is without foundation.

awarded where pendent claims for relief under a federal statute such as the Social Security Act are properly joined with constitutional claims brought under section 1983.[7]

The joinder in a complaint of pendent Social Security Act claims with constitutional claims brought under section 1983 does not remove an action from coverage of section 1988.[8] As Mr. Justice Stevens stated in *Hutto*,

---

[7] Revised Statutes §1979, 42 U.S.C. 1983, authorizes actions to be brought on behalf of any person who has been subjected to the deprivation, under color of state law, of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. §1983. In *Chapman v. Houston Welfare Rights Organization*, ___ U.S. ___, 99 S.Ct. 1905 (1979), four members of this Court expressed their belief that section 1983 provides a remedy for deprivations under color of state law of any federal statutory right. *See* ___ U.S. at ___, 99 S.Ct. at 1930, (White, J. concurring in the judgment); ___ U.S. at ___, 99 S.Ct. at 1944, (Stewart, J. dissenting); *but see*, ___ U.S. ___, 99 S.Ct. at 1919, (Powell, J. concurring). We endorse the opinions of these four Justices as well as the arguments made on behalf of the public assistance recipients in *Chapman* and urge their adoption by a majority of the Court. If the Court holds, as we urge, that violations of the Social Security Act may be remedied under the "and laws" language of section 1983, then plaintiff's action is expressly covered in all respects by section 1988.

[8] Since this case was settled prior to judgment, the existence of the constitutional claims in the complaint should be sufficient alone to support the fee award, and the Court need not decide whether plaintiff's statutory claims were properly brought under section 1983, see note 7, *supra*, or as an implied action under the Social Security Act itself. It should be noted, however, that in a long line of cases dating back to *King v. Smith*, 392 U.S. 309 (1968), this Court has held that violations of the public assistance provisions of the Social Security Act may be challenged in federal court if they are joined with constitutional claims which arise from the same operative facts as the statutory claims and which are substantial enough to support federal jurisdiction. *See, Miller v. Youakim*, 440 U.S. 125 (1979); *Quern v. Mandley*, 436 U.S. 725

[footnote continued]

"The [Attorney's Fees Awards] Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws . . . ." 437 U.S. at 694. An action alleging violations of the Fourteenth Amendment is an action brought to enforce 42 U.S.C. §1983 within the meaning of section 1988. See *Hutto v. Finney*, 437 U.S. 678 (1978). Nothing in the statute suggests that the constitutional claim must be the only claim alleged in an action before section 1988 may apply. Indeed, by focusing on the nature of the action brought, rather than on the basis for the relief awarded, the statutory language strongly suggests that so long as there is a claim under section 1983 or one of the other enumerated statutes in the complaint, it is immaterial what other claims may also be asserted.

This construction of section 1988 is supported by the statute's legislative history. The principal impetus for passage of the Fees Awards Act was this Court's decision

---

(1978), *Batterton v. Francis*, 432 U.S. 416 (1977); *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Van Lare v. Hurley*, 421 U.S. 338 (1975); *Lascaris v. Shirley*, 420 U.S. 730 (1975); *Burns v. Alacala*, 420 U.S. 575 (1975); *Shea v. Vialpando*, 416 U.S. 251 (1974); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Hagans v. Lavine*, 415 U.S. 528 (1974); *New York Dep't of Social Services v. Dublino*, 413 U.S. 405 (1973); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Carter v. Stanton*, 405 U.S. 669 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *Lewis v. Martin*, 397 U.S. 552 (1970); *Rosado v. Wyman*, 397 U.S. 397 (1970). These cases strongly suggest that, apart from section 1983, a private cause of action to remedy state violations of the Social Security Act may be implied directly from the Act itself. *See, Chapman*, ___ U.S. ___, 99 S.Ct. at 1931 n. 6, (White, J. concurring); *but see, Cannon v. University of Chicago*, ___ U.S. ___, 99 S.Ct. 1946, 1979 n. 11 (1979) (Powell, J. dissenting). Mr. Justice Harlan's opinion in *Rosado v. Wyman* appears to have already reached this conclusion in behalf of the Court, and it is required by the Court's recent Decisions regarding implied rights of action. *See generally, Cannon v. Univ. of Chicago*, ___ U.S. ___, 99 S.Ct. 1946 (1979); *Cort v. Ash*, 422 U.S. 66 (1975).

in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that plaintiffs who vindicate the public interest by successfully enforcing federal laws are not entitled to attorneys' fees in the absence of specific legislative authorization. Congress intended the Fees Awards Act to provide the necessary statutory authority in cases brought under section 1983 and the other enumerated statutes, and to thereby reinstate the rules developed by the federal courts prior to *Alyeska* for determining when fees should be available in section 1983 cases. As Congressman Railsback stated, "what we are really doing is codifying the practice that was going on prior to the Alyeska case." 122 Cong. Rec. 35117 (1976).[9]

Prior to *Alyeska*, lower courts had awarded attorneys' fees in cases joining federal statutory claims with constitutional claims. *See, e.g., Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972). The Report of the House Judiciary Committee accompanying H.R. 15460 noted this practice and made it clear that the Committee wished to allow fee awards in such cases:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the nonconstitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans v. Lavine, supra; United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative facts.' *United Mine Workers v. Gibbs, supra* at 725.

H. Rep. at 4 n. 7.[10]

---

[9]The Report of the House Judiciary Committee similarly stated, "The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing" the bill. H. Rep. No. 94-1558, 94th Cong., 2d Sess. 8 (1976), [hereinafter H. Rep.]. Representative Kastenmeier stated, "[The bill] does not overturn law or practice, except the Alyeska case . . . ." 122 Cong. Rec. 35126 (1976). Senator Kennedy also stated on the Senate floor that the bill "is intended simply to expressly authorize the kinds of awards of legal fees that they had been allowing prior to the *Alyeska* decision." 122 Cong. Rec. 31472 (1976). Finally, both of the Committee Reports indicated their approval of the pre-*Alyeska* decisions with respect to the standards for awarding fees to prevailing plaintiffs, H. Rep. at 6, S. Rep. No. 94-1011, 94th Cong. 2d Sess. 4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5912 [hereinafter S. Rep.]; and to prevailing defendants, H. Rep. at 6-7, S. Rep. at 5; for awarding fees pendente lite, H. Rep. at 8, S. Rep. at 5; and for computing the amount of fees to be awarded, H. Rep. at 8-9, S. Rep. at 6.

[10]The State's argument that the House Report is not authoritative (Brief For Petitioner at 17), has no support in the legislative history. The Senate Judiciary Committee reported S. 2278 on June 29, 1976, and the House Judiciary Committee reported H.R. 15460 on September 15, 1976. When S. 2278 was brought up for consideration in the full Senate, Senator Kennedy, as floor manager, offered an amendment in the nature of a substitute which was intended to "confirm [sic] the language of the bill precisely to the House bill, H.R. 15460," by adding Title IX of Public Law 92-318 to the list of enumerated statutes in the Senate version. 122 Cong. Rec. 31472 (1976). It was this version which was passed by the Senate, with the addition of another amendment pertaining to

[footnote continued]

The view that cases joining federal statutory with constitutional claims were covered by the Act, was reiterated by Representative Drinan, the chief sponsor of H.R. 15460, when the bill reached the floor of the House:

> Section 1983 protects civil and constitutional rights from abridgement . . . . Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights.

122 Cong. Rec. 35122 (1976). Representative Fish also cited a case involving both constitutional and federal statutory claims among the types of cases that would be covered by the Act. 122 Cong. Rec. 35126 (1976).

There is similar evidence of congressional intent in the Senate. The Report of the Senate Judiciary Committee noted that it was intended to reach suits brought under section 1983 to redress "violations of the Federal Constitution or laws by officials sworn to uphold the laws." S. Rep. at 4. During floor debate, Senator Kennedy described several types of cases that would be

---

Internal Revenue cases. Because of Congress' desire to adjourn, there would not have been time for a conference of both Houses if the House had approved the House Committee bill which did not include the Internal Revenue amendment. The House, therefore, took up and approved S. 2278 in the exact form adopted by the Senate, rather than H.R. 15460. However, as noted by numerous House members, the two bills were "nearly identical," differing only with respect to the Senate's amendment pertaining to Internal Revenue cases. 122 Cong. Rec. 35115, 35122, 35125 (1976). Rep. Drinan also stated during the House debates on S. 2278 that "[b]ecause the bills are identical, with the limited exception of the Allen amendment, it is intended that the courts will interpret S. 2278 in accordance with House Report No. 94-1558, together with the Senate report and the debates in both Houses." 122 Cong. Rec. 35122. The House report was relied upon by this Court in *Hutto v. Finney*. *See* 437 U.S. at 694 n. 23.

covered under S. 2278. One of these was *Bond v. Stanton*, 504 F.2d 1246 (7th Cir. 1974) *cert. denied*, 420 U.S. 984, on attorneys' fees, 528 F.2d 688 (7th Cir. 1976), *vacated and rem.* 429 U.S. 973 (1976), *on remand*, 555 F.2d 172 (7th Cir. 1977) *cert. denied*, 438 U.S. 916 (1978), a case involving a state's denial of medical services required to be provided to public assistance recipients by Title XIX of the Social Security Act. 122 Cong. Rec. 33314 (1976). Similarly, Senator Abourezk, another member of the Judiciary Committee who supported S. 2278, stated, "This legislation is intended to cover cases based on both constitutional and statutory rights, including supremacy clause cases. See, 42 U.S.C. §1983." 122 Cong. Rec. 33315 (1976).[11]

The principle purpose of the Fees Awards Act was to encourage litigation to enforce the civil rights laws passed pursuant to the Fourteenth Amendment. S. Rep. at 5; H. Rep. at 1, 9; 122 Cong. Rec. 33313 (1976) (remarks of Sen. Kennedy) ("In enacting the basic civil rights attorneys fees awards bill, Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws."). *See also*, 122 Cong. Rec. 35123, 35127, 35128 (1976), (remarks of Reps. Drinan, Holtzman, and Seiberling).

---

[11] It is true that with the exception of the passage from the House Report, these statements appear to assume that federal statutory claims can be brought under section 1983. However, the Court need not decide that question here. The language of §1988 is broad enough to include cases joining statutory and constitutional claims whether or not statutory claims may be reached in their own right under section 1983. The legislative history of the Fees Awards Act, quoted in the text, shows Congress' desire to include these cases under whatever legal theory they might be authorized. Even if this Court were to hold in a future case that there is no cause of action to enforce the Social Security Act either under section 1983 or the Act itself, it is clear that under the law at the time this case was instituted and settled, all of the claims alleged in the complaint were proper. Nothing more is required.

Inclusion of cases joining pendent federal statutory claims with constitutional claims serves this purpose, since parties might be deterred from bringing suit if they knew they could be denied fees solely because the court refused to decide their constitutional claims. At the same time, it encourages an orderly process of constitutional adjudication. As Mr. Justice Stevens stated for the Court last term, "'[i] f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *New York City Transit Authority v. Beazer,* 440 U.S. 568, 582 (1979) *quoting from Spector Motor Co. v. McLaughlin,* 323 U.S. 101, 105 (1944); *County Court of Ulster County v. Allen,* ___ U.S. ___, 99 S. Ct. 2213, 2223 (1979). However, this principle would be violated if courts were forced to decide a plaintiff's constitutional claims merely to determine whether he were entitled to a fee award. *See, e.g., Southeast Legal Defense Group v. Adams,* 436 F. Supp. 891, 895 (D. Ore. 1977). These interests strongly counsel against a construction of section 1983 which would bar fee awards merely because a plaintiff's constitutional claims were not decided on the merits.

B. Plaintiff Was a Prevailing Party Within the Meaning of the Fees Awards Act Because She Obtained Significant Relief Through the Consent Decree and the Claims Alleged in the Complaint Were Substantial

Shortly after plaintiff filed her Amended Complaint, the Department of Social Services agreed to the entry of a Consent Decree which, according to the district court, "gave the plaintiff, as well as the class she represented,

virtually all the relief sought in the complaint." 455 F. Supp. at 1346. Specifically, the Department agreed that limits would no longer be imposed on deductions for work-related expenses. It also agreed to increase the work-related transportation allowance from 6 cents to 12 cents per mile and to apply the increase to current as well as future recipients; to base other standard allowances for work-related expenses upon current prices available in the locality where the recipient resides; and to review the standard allowances at least annually in light of increases in the cost of living. Finally, in response to plaintiff's procedural due process complaints, the Department agreed to give both written and oral notice to recipients of their right to claim deductions for work-related expenses in excess of the Department's standard allowances and to challenge any refusal to allow such excess deductions in an administrative fair hearing. (A. 76-82). The relief obtained through the Consent Decree thus responded to plaintiff's claims involving the calculation of work-related expenses and her claims involving the lack of notice respecting the Department's policies in this area.[12]

It has been the virtually unanimous view of the lower courts that plaintiffs who recover substantial relief prior to judgment through the voluntary action of the defendant in response to their suit or through a settlement agreement in the suit are "prevailing parties" within the

[12] Defendant suggests in his Brief for Petitioner at 11 that plaintiff was not a prevailing party because she had unsuccessfully asserted her claim that she was denied work-related expense deductions in a state administrative hearing. However, as the court of appeals recognized, the defendant failed to raise this claim of *res judicata* with the district court at any time prior to entry of the Consent Decree and is thus precluded from raising it now. *See United States v. Friedland,* 391 F.2d 378, 381-82 (2d Cir. 1968), 441 F.2d 855 (2d Cir.), *cert. denied,* 404 U.S. 867, 914 (1971); *Crowe v. Cherokee Wonderland, Inc.,* 379 F.2d 51 (4th Cir. 1967).

meaning of section 1988 and other similarly worded attorneys' fees statutes. *See, e.g., Iranian Students Ass'n v. Edwards,* 604 F.2d 352, 353 (5th Cir. 1979); *Dawson v. Pastrick,* 600 F.2d 70, 78 (7th Cir. 1979); *Bonnes v. Long,* 599 F.2d 1316, 1318 (4th Cir. 1979); *Ross v. Horn,* 598 F.2d 1312, 1322 (3d Cir. 1979); *Nadeau v. Helgemoe,* 581 F.2d 275, 278-81 (1st Cir. 1978); *Fischer v. Adams,* 572 F.2d 406, 410-11 (1st Cir. 1978); *Foster v. Boorstin,* 561 F.2d 340, 343 (D.C. Cir. 1977); *Brown v. Culpepper,* 559 F.2d 274, 277 (5th Cir. 1977); *National Bldg. Maintenance, Inc. v. Sampson,* 559 F.2d 704, 708-709 (D.C. Cir. 1977); *Cuneo v. Rumsfeld* 533 F.2d 1360, 1364 (D.C. Cir. 1977); *Peltier v. City of Fargo,* 533 F.2d 374, 380 (8th Cir. 1976); *Evans v. Sheraton Park Hotel,* 503 F.2d 177, 189 (D.C. Cir. 1974); *Parham v. Southwestern Bell Telephone Co.,* 433 F.2d 421, 429-30 (8th Cir. 1970); *Parker v. Matthews,* 411 F.Supp. 1059, 1962-63 (D.D.C. 1976), *aff'd sub nom., Parker v. Califano,* 561 F.2d 320 (D.C. Cir. 1977). These cases reflect the courts' recognition of several strong policy reasons for allowing attorneys' fees in settled cases, as well as the clear intent of Congress as expressed in the Committee Reports for the Fees Awards Act.

The fundamental purpose of fee shifting provisions, to encourage private enforcement of the underlying rights created by Congress, would be seriously frustrated if plaintiffs were not entitled to attorneys' fees where they obtain relief prior to judgment. *See Bonnes v. Long,* 599 F.2d at 1318. Plaintiffs could not afford to take the risk of litigation if their right to fees could be so easily defeated. And many private attorneys would be unwilling to accept civil rights cases on a contingent fee basis if that were the rule.

As important, it would discourage voluntary settlement of judicial disputes, if the only way plaintiffs could recover attorneys' fees were to go to trial on the merits.[13] As the court of appeals stated in this case, the denial of fees to settling plaintiffs "would encourage plaintiffs to try cases in which reasonable settlement offers have been received, merely to ensure a fee award." 594 F.2d at 340. Finally, if parties cannot be awarded attorneys' fees by the court, after a settlement of their main claims, they would be forced to negotiate for attorneys' fees prior to the final settlement. Where the party's attorney has agreed to seek payment of his fee only from the the defendant, and not out of his client's recovery, such negotiations may present serious conflicts of interest. See *Prandini v. National Tea Co.,* 557 F.2d 1015 (3d Cir. 1977); *Regalado v. Johnson,* 79 F.R.D. 447, 451, (E.D. Ill. 1978). These conflicts may be avoided if claims for attorneys' fees may be submitted to the court, or settled, after the court has approved the settlement of the substantive claims in the case.

Congress was aware of these considerations when it adopted the Fees Awards Act, and it made it clear that a party who obtains relief through a voluntary settlement is a prevailing party under section 1988. The House Report, for example, stated:

[13] This is not to say that a plaintiffs who settle a case for less than all of the relief sought in the complaint should recover attorneys' fees to the same extent as if they had gone to trial and prevailed on all issues. In fixing the amount of attorneys' fees district courts have discretion to take into account the extent to which the plaintiff failed to obtain full relief. *See, e.g., Sethy v. Alameda County Water Dist.,* 602 F.2d 894, 898 (9th Cir. 1979); *Jones v. Diamond,* 594 F.2d 997, 1027 (5th Cir. 1979); *Brown v. Bathke,* 588 F.2d 634, 637 (8th Cir. 1978); *Nadeau v. Helgemoe,* 581 F.2d 275, 278-79 (1st Cir. 1978); *Hughes v. Repko,* 578 F.2d 483, 487 (3d Cir. 1978).

The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County v. Fair,* 507 F.2d 281 (6th Cir. 1974); *Parker v. Matthews,* 411 F. Supp. 1059 (D.D.C. 1976); *Aspira of New York, Inc. v. Board of Education of the City of New York,* 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed. *E.g., Parham v. Southwestern Bell Telephone Co.,* 433 F.2d 421 (8th Cir. 1970); *Brown v. Gaston County Dyeing Machine Co.,* 457 F.2d 1377 (4th Cir.), *cert denied,* 409 U.S. 982 (1972): see also *Lea v. Cone Mills Corp.,* 438 F.2d 86 (4th Cir. 1971); *Evers v. Dwyer,* 358 U.S. 202 (1958).

H. Rep. at 7. Similarly, the Senate Report, citing a number of prior decisions, stated, "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. at 5.

Defendant does not contest this authority. Rather he argues that plaintiff in this case was not the prevailing party because "most of the provisions of the consent decree were restatements of what federal law required

and what the Department claimed it had been doing all along." Brief for Petitioner at 19.[14] The court of appeals found, however, "that the State changed its policies with great reluctance and only under the pressure of the lawsuit." 594 F.2d at 341. This finding is amply supported in the record and should not be disturbed.[15]

Finally, although plaintiff's claims were not decided on the merits, both the district court and the court of appeals held that she was the prevailing party because her claims were not insubstantial. Thus, the court of appeals stated: "[i]t does not matter which claim induced the

---

[14]The state also contends that the plaintiff was not the prevailing party on her constitutional claims because at the time the Consent Decree entered only a three-judge court could have entered an injunction against the defendant on the constitutional claim. Brief for Petitioner at 18. But the three-judge court statute, 28 U.S.C. § 2284, only prohibited a single judge from enjoining the enforcement of an unconstitutional statute. No such finding was required to be made before entry of the Consent Decree. This does not mean, however, that plaintiff's constitutional claims were not before the court, any more than would be the case where a single judge enters other orders in three-judge court cases. *See, Public Service Comm'n v. Brashear,* 312 U.S. 621 (1941).

[15]Defendant's admissions during discovery established that he had not corrected his work expense policies prior to the agreement. See, pp. 3-5, *supra.* Defendant conceded further in his Brief to the court of appeals, at 39, that the Department had not been properly informing recipients of what expense allowances they would receive, as alleged by plaintiff in her Amended Complaint (A. 61-62), and that plaintiff was responsible for that change being made. It is also relevant to note that public assistance recipients had previously been forced to sue in federal court in order to obtain changes in the state's work expense policies; *see, Campagnuolo v. White,* Civ. No. 13968 (D. Conn. June 1972) (unpublished).

Furthermore, the settlement in this case was remedied under the close supervision and encouragement of the district judge, (*see,* R.A., certified list of docket entries, referring to hearing dates of February 2, 1977, through March 2, 1977), who was therefore in the best position to evaluate the defendant's motivation with respect to the settlement.

concessions or which claim would have been successful at trial as long as the constitutional claim is substantial and arises from the same operative facts as the non-fee claim." 594 F.2d at 340. This holding is consistent with the express language of the House Report, see p. 19 *supra*. It also served to ensure that the district court had jurisdiction to enter the Consent Decree, *see, Hagans v. Lavine,* and that the plaintiff did not obtain the benefits of the Consent Decree merely because of the defendant's desire to avoid nuisance litigation. *See Nadeau v. Helgemoe,* 581 F.2d 275, 278-279; *Bonnes v. Long,* 599 F.2d 1316, 1319 (4th Cir. 1979); *Ross v. Horn,* 598 F.2d 1312, 1322 (3d Cir. 1979). If plaintiffs who settled their cases were required, as a condition of obtaining attorneys' fees, to prove that they would have prevailed on their claims if the case had gone to trial, then the benefits of settlement to the parties and the courts would be substantially vitiated, and the courts would be required to decide numerous constitutional issues unnecessarily.

In sum, the courts below correctly decided under appropriate standards that plaintiff in this case was the prevailing party within the meaning of 42 U.S.C. §1988.

2. The Courts Below Correctly Held That an Award of Fees Was Not Barred by the Eleventh Amendment

Since attorneys' fees were awarded in this case against the defendant in his official capacity, it is necessary to consider whether the award is prohibited by the Eleventh Amendment. The answer to this question, plaintiff submits, is found in this Court's decision in *Hutto v. Finney,* 437 U.S. 678 (1978).

Hutto upheld attorneys' fees awarded under section 1988 against state prison officials in their official capacities. Relying on its previous decision in *Fitzpatrick v.*

Bitzer, 427 U.S. 445 (1976), the Court held that "Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment." 437 U.S. at 693. And, it found that Congress, in adopting the Fees Awards Act, intended both to exercise its power under the Fourteenth Amendment and "to authorize fee awards payable by the States when officials are sued in their official capacities." *Id.* at 693-94.

The Court rejected the contention of the prison officials that Congressional intent to abrogate the Eleventh Amendment under section 1988 was not sufficiently clear since it was expressed only in the reports and debates on the bill but not in the statute itself. Such a legislative statement was not necessary, according to Mr. Justice Stevens, because attorneys' fees are awarded under section 1988 as an element of costs, can "[c]osts have traditionally been awarded without regard for the State's Eleventh Amendment immunity . . . . The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." 437 U.S. at 695.

Fees were awarded in *Hutto* after a finding, affirmed on appeal, that conditions in the prisons maintained by the defendants violated the Eighth and Fourteenth Amendments. The fact that the plaintiff's constitutional claims in this case were resolved prior to judgment does not, however, require a different result. As shown in Part I, the allowance of attorneys' fees, in cases in which consent judgments have entered, serves the interests of efficient judicial administration and sound constitutional adjudication. It is, therefore, as true in this case as in

Hutto that "A federal court's interest in orderly, expeditious proceedings 'justifies [it] in treating the state just as any other litigant, and in imposing costs on it' when an award is called for." 437 U.S. at 696, quoting from *Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70, 77 (1927).[16]

The Court in *Hutto* also pointed out that prior decisions such as *Edelman v. Jordan,* and *Employees of the Dept. of Public Health and Welfare v. Department of Public Health and Welfare,* 411 U.S. 279 (1973), were not applicable to attorneys' fees awards because such awards "could hardly create any hardship for a State," 437 U.S. at 697 n. 27, and because "[u]nlike ordinary 'retroactive' relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead the award reimburses him for a portion of the expenses he incurred in seeking prospective relief." 437 U.S. at 695 n. 24. Again, these conclusions are not altered because the plaintiff in this case also alleged in her Complaint that her rights under the Social Security Act were violated or because the case was settled by a Consent Decree entered prior to trial on the merits.

The court of appeals below held that fee awards against state officials are not barred by the Eleventh Amendment because they fit within the "ancillary effect" doctrine of

[16] Insofar as the award of attorneys' fees as costs serves the purpose of regulating the behavior of parties during litigation, see *Hutto v. Finney,* 437 U.S. at 695 n. 24, it is as useful during settlement negotiations as in any other stage of litigation.

Edelman v. Jordan, 415 U.S. 651 (1974), in that they are "incident to a judgment granting prospective relief." 594 F.2d at 341. Other courts have held similarly.[17]

The court of appeals' holding derives from this Court's holding in *Edelman,* that prospective injunctive relief may be awarded against state officials because "the fiscal consequences to state treasuries . . . [are] the necessary result of compliance with decrees which by their terms [are] prospective in nature". 415 U.S. at 668. This holding was reaffirmed last term in *Quern v. Jordan,* 440 U.S. 332 (1979), which upheld an order directing defendants to give notice advising public assistance claimants of their rights, because the notice was "more properly viewed as ancillary to the prospective relief already ordered by the Court". *Quern* at 349.

Fee awards have similarly been determined by Congress to be necessary to obtaining prospective relief in federal court. If the Eleventh Amendment does not prohibit the expenditure of state funds where necessary to effectuate a prospective order of the court, then it should not prohibit the award of attorneys' fees which are necessary to ensure that the case will be brought at all. The award of fees is thus ancillary. *See, Note, Attorneys' Fees And The Eleventh Amendment,* 88 Harv. L. Rev.

[17] *Fitzpatrick v. Bitzer,* 519 F.2d 559, 571-72 (2d Cir. 1975), *aff'd in part, rev'd in part,* 427 U.S. 445 (1976); *Souza v. Travisono,* 512 F.2d 1137, 1139-40 (1st Cir. 1975), *vacated and remanded,* 423 U.S. 809 (1975); *Class v. Norton,* 505 F.2d 123 (2d Cir. 1974); *Boston Chapter NAACP, Inc. v. Beecher,* 504 F.2d 1017, 1028-30 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *Jordan v. Fusari,* 496 F.2d 646 (2d Cir. 1974). *Cf. Jordan v. Gilligan,* 500 F.2d 701 (6th Cir. 1974), *cert. denied,* 421 U.S. 991 (1975); *Skehan v. Board of Trustees,* 501 F.2d 31 (3d Cir. 1974), *vacated and remanded,* 538 F.2d 53 (1976) (en banc), *cert. denied,* 429 U.S. 979 (1976).

1875, 1893-96 (1975); S. Rep. at 5 ("We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws . . . .").

The Court's analysis in *Hutto* strongly suggests additionally, that attorneys' fees, as litigation costs, fall outside of the Eleventh Amendment's prohibition without regard to whether or not Congress has acted pursuant to its authority under the Fourteenth Amendment.[18] *See also, Fitzpatrick v. Bitzer,* 427 U.S. at 456, concurring opinion of Mr. Justice Stevens.[19] However, even if congressional power under section 5 was essential to the Court's analysis, a different result is not required in this case, for it is clear that Congress has authority under section 5 to provide fees in cases, such as this one, where substantial constitutional claims are raised in the complaint but not decided by entry of final judgment.

It cannot be denied that Congress has power under section 5 to authorize the award of attorneys' fees against states where there has been a judicial finding of a violation of the Constitution or of a statute passed pursuant to section 5. In *Fitzpatrick v. Bitzer,* the Court held that Congress has power under section 5 of the Fourteenth Amendment to permit the award of attorneys'

[18]Attorneys' fees have been referred to as costs "as between solicitor and client." *Sprague v. Ticonic National Bank,* 307 U.S. 161, 165 (1939).

[19]Congress' description of attorneys' fees "as a part of costs" appears to have been deliberate, as a way of indicating its belief that attorneys' fees, like costs, are not subject to the Eleventh Amendment, referring as it does to *Fairmont Creamery Co. v. Minnesota.* S. Rep. at 5, n. 6. The House Report also cites to *Fitzpatrick v. Bitzer,* H. Rep. at 7, n. 14 and may have relied on Justice Stevens' concurring opinion to the effect that attorneys' fees should be categorized as other litigation costs.

fees against states found to have violated the employment discrimination prohibitions of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. §2000e. In *Hutto v. Finney,* the Court stated that under section 5 Congress has power to authorize the award of attorneys' fees against state officials who have been found in violation of the Eighth and Fourteenth Amendments.[20]

Fitzpatrick and *Hutto* are consistent with the Court's prior pronouncement that "§5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan,* 384 U.S. 641, 651

[20]The defendant's discussion of *Edelman v. Jordan,* Brief for Petitioner at 13, totally misreads the Court's opinion in that case. Nothing in *Edelman* suggests that its holding with respect to congressional intent to abrogate the Eleventh Amendment under section 1983 depended upon the fact that statutory and constitutional claims had been joined in that Complaint. The Court's decision rested on the larger question of congressional intent with respect to state immunity from damages in all types of cases. *See, Quern v. Jordan,* 440 U.S. at 344-45; *Hutto v. Finney,* 437 U.S. at 697-98.

Similarly, the defendant's reliance on *Chapman v. Houston Welfare Rights Organization,* ___ U.S. ___, 99 S.Ct. 1905 (1979), Brief for Petitioner at 13-16, for the contention that neither section 1983 nor section 1988 provide the requisite congressional authorization necessary to overcome Eleventh Amendment immunites, is mistaken. The Court's conclusions in *Chapman* that section 1983 does not itself protect any civil rights, and that the Social Security Act is not a law providing for equal rights, were important in that case because of the limiting language of 28 U.S.C. §1343(3) and (4). Here, however, section 1988 authorizes attorneys' fees to be awarded in any action brought to enforce section 1983, including actions were pendent claims are joined to constitutional claims, not just in actions involving "civil rights." Congressional authorization for the award of attorneys' fees against state officials in cases such as this one, as in *Hutto v. Finney,* is thus found in section 1988 itself.

(1966). The Fees Awards Act was intended to encourage more vigorous enforcement of laws passed pursuant to the Fourteenth Amendment. Through extensive hearings, Congress was aware that many citizens could not afford the legal fees required to maintain protracted litigation necessary to vindicate rights secured by the Constitution and federal laws, and that the resulting lack of enforcement of federal constitutional and statutory guarantees had the effect of undermining confidence in governmental processes.[21] The shifting of litigation costs such as attorneys' fees was recommended as the best available method of encouraging litigation under the civil rights laws.

From the standpoint of congressional power under Section 5, it is a very small step from providing a remedy, such as attorneys' fees, where states have been found by a court to have violated the Fourteenth Amendment or a statute enacted pursuant to the Fourteenth Amendment, to providing a similar remedy in cases where the charges of constitutional violations are not resolved by a court on the merits because of a prior settlement of the parties. Having weighed "the various conflicting considerations," *Katzenbach v. Morgan,* 384 U.S. at 653, Congress was "well within [its] authority," *id.*, to conclude that litigation to enforce rights guranteed by the Fourteenth Amendment will be encouraged and enhanced if attorneys' fees may be awarded even where no final judicial decision is reached on the constitutional issues presented in a case. Congress heard specific testimony concerning the frequent practice of government defendants at-

[21] *Hearings on Legal Fees Before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary*, 93rd Cong., 1st Sess. 1, 790, 796-97, 806-07, 833-36, 852, 855-58 (1973).

tempting to moot cases or settle them prior to final judgment,[22] and it quite properly concluded that the remedial purposes of the Fees Awards Act might be undercut if defendants could avoid the imposition of attorneys' fees merely by this device. Similarly, Congress was aware that claims under the Fourteenth Amendment often are joined with claims under state law or under federal statutes, see pp. 18-23, *supra,* and it again reasonably concluded that permitting fees to be awarded in such cases would serve the purpose of encouraging litigation to enforce the Fourteenth Amendment.

Congress' resolution of these issues is "plainly adapted" to the end of encouraging litigation under the Fourteenth Amendment. *Katzenbach v. Morgan,* 384 U.S. at 651. The Act places an additional remedy in the hands of federal judges to be used for the purpose.[23] As construed by the court of appeals in this case, in order to obtain attorneys' fees awards under section 1988 prior to a final judicial determination of the constitutional claim, a plaintiff must demonstrate that his constitutional claim was substantial enough in its own right to support the jurisdiction of the court; that he obtained relief which remedied at least in part the constitutional and statutory violations alleged; and, finally, that this relief was the result of the lawsuit and not of the defendant's

[22] *Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House of Representatives Committee on the Judiciary*, 94th Cong., 1st Sess. 134-35 (1975).

[23] It is clear after *Katzenbach v. Morgan*, 384 U.S. at 652 and 667-670 (Harlan, J. dissenting), that remedial legislation enacted under section 5 of the Fourteenth Amendment to cure violations of constitutional rights is a justifiable exercise of congressional power. By enacting legislation which provides federal judges with an additional remedy in appropriate cases, Congress has left the interpretation of the substantive guarantees of the Fourteenth Amendment to the judiciary.

unrelated actions. Moreover, the discretion afforded the courts under section 1988 in determining whether fees are appropriate and, if so, in what amount, further guarantees that the remedy afforded will be adapted to Congress' proper purposes under section 5.

Finally, there can be no argument that the award of attorneys' fees in cases such as this one is prohibited by "the letter and spirit of the Constitution." *Katzenbach v. Morgan,* 384 U.S. at 651. The State does not and could not contend that the award of attorneys' fees under section 1988 in this case violates any provision of the Constitution apart from the Eleventh Amendment. And, with respect to that provision, *Fitzpatrick* and *Hutto* both make clear that, so long as the award is within Congressional power under section 5, as we contend it is, there can be no conflict with the Eleventh Amendment.

Nor, in light of *Fitzpatrick* and *Hutto,* can it be contended that fee awards "impair states' integrity or their ability to function effectively in a federal system." *Fry v. United States,* 421 U.S. 542, 547-48 (1975); *see also, National League of Cities v. Usery,* 426 U.S. 833, 851-52 (1976). As *Hutto* expressly recognized, attorneys' fee awards "could hardly create any such hardship for a state," 437 U.S. at 697, N. 27, especially where, as here, the case is resolved at an early stage by a consent judgment, before the time and effort invested in the case become significant.

In sum, the fact that plaintiff's constitutional claims were never resolved on the merits by the district court does not mean that the attorneys' fee award in this case is barred by the Eleventh Amendment. Under either of

the two rationales relied on by this Court in upholding the section 1988 fee award in *Hutto,* the attorneys' fee in this case was proper.

CONCLUSION

For the foregoing reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL B. TRISTER
SOBOL & TRISTER
Suite 501
910 Seventeenth St., N.W.
Washington, D.C. 20006
(202) 223-5022

HOWARD L. ZWICKEL
CENTER ON SOCIAL WELFAI
POLICY AND LAW
95 Madison Avenue
New York, N.Y. 10016
(212) 679-3709

DAVID C. SHAW
JOAN EISENMAN PILVER
CATHERINE M. CALLERY
ROSALIND RIBYAT SILVERSTEIN
THE LEGAL AID SOCIETY OF
HARTFORD COUNTY, INC.
525 Main Street
Hartford, Conn. 06103
(203) 566-6360

Counsel for Respondents